December 2010

Office of the Saskatchewan Information and Privacy Commissioner

FOIP FOLIO

Happy Holidays from the OIPC!

All of us at the Office of the Saskatchewan Information and Privacy Commissioner extend our best wishes to our readers for a wonderful holiday season.

Thanks for all of your efforts and assistance in 2010 in protecting the access and privacy rights of Saskatchewan residents. We wish everyone much success and happiness in 2011.

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MISDIRECTED FAXES AND IMPROPER DISCLOSURE OF PATIENT INFORMATION

Saskatchewan Information and Privacy Commissioner, **Gary Dickson**, has concluded an own-motion investigation under *The Health Information Protection Act* (HIPA). This resulted in the *Report on Systemic Issues with Faxing Personal Health Information*. The Report considers 60 faxes sent in 2009 by 31 different Saskatchewan trustees and trustee organizations to a private business instead of the medical clinic which was the intended addressee.

The Commissioner found that there is a systemic issue with respect to an absence of policies and procedures, inadequate staff training and lack of rigour in the response to discovery of a data breach. The three key factors that led to the privacy breaches were:

- Change of fax number;
- Use of outdated pre-programmed fax numbers; and
- Carelessness of employees due to lack of training.

The Office of the Information and Privacy Commissioner (OIPC) utilized in its investigation two different tools produced by our office: (1) *Privacy Breach Guidelines*, and (2) *Privacy Considerations: Faxing Personal Information and Personal Health Information*. The Commissioner graded the actions of the trustees involved and discussed remedial work required to achieve satisfactory compliance under HIPA. Out of a possible total score of 38, the average score of the 31 trustees was only 13.7. A single trustee [a regional health authority (RHA)] had a score above 30. None of the physician offices and only two of the pharmacies reviewed had a score higher than 20. In terms of breach notification to the patients affected, 5 of the 8 RHAs and 9 of the 11 physician offices provided notice. Only 3 of the 9 pharmacies provided notification to patients. Only 14 of the 31 trustees had written policy notwithstanding that this is something we have determined is required by section 16 of HIPA. The full Report is available under the *Reports* tab at www.oipc.sk.ca.

SASKATOON SHOULD PROVIDE COMMISSIONER WITH REPORT

Commissioner Dickson has also issued his Review Report LA-2010-002 that considered the actions of the City of Saskatoon in refusing to provide the OIPC with a record of a harassment investigation involving the applicant. The applicant had been an employee of the Saskatoon Police Service but the investigation was undertaken by the City. The OIPC Report focuses on the issue of 'possession or control' in section 5 of LA FOIP. The Commissioner concluded that to be in possession of a record for purposes of LA FOIP the local authority must have bare

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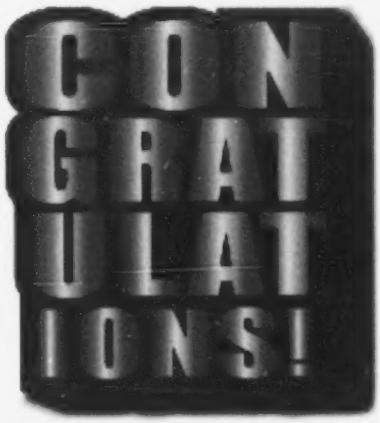
possession plus some element of control. This need not be full or exclusive control. This Report also considered the contention of the City that the record in question had been placed in the archives of the City and was therefore excluded from the scope of LA FOIP pursuant to section 3(1)(c). The Commissioner found that this exclusion did not apply on the facts of this case. The full Report is available under the *Reports* tab at www.oipc.sk.ca.

JENNIFER STODDART RE-APPOINTED AS CANADA'S PRIVACY COMMISSIONER

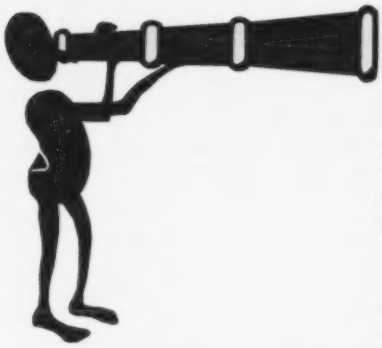
The OIPC enthusiastically welcomed the news that our current federal Privacy Commissioner has been reappointed. Commissioner **Jennifer Stoddart** has achieved a well-deserved reputation as a thoughtful and effective leader in Canada and throughout the international privacy community. Commissioner Stoddart has also been tremendously helpful to Saskatchewan in a host of ways including creating the *Privacy Made Easy* pilot project for small and medium sized businesses in Saskatchewan. She has readily participated in Saskatchewan conferences and workshops. Commissioner Stoddart and her staff have also been generous in providing advice and assistance to our Portfolio Officers and Commissioner in the course of our work. She has consistently demonstrated a profound understanding of the role and challenges of provincial and territorial oversight offices in promoting the protection of personal information.



ALBERTA JUSTICE FOUND TO HAVE VIOLATED PRIVACY OF 25 EMPLOYEES

In a recent Investigation Report issued by **Frank Work**, Alberta Information and Privacy Commissioner, it was determined that a series of credit checks conducted by the employer, Alberta Justice and Attorney General , violated the FOIP Act in that province. Alberta Justice agreed with the Commissioner's office that the credit checks were inappropriate and has taken steps to address the issues and to prevent a similar recurrence. You can obtain a copy of the Investigation Report F2010-IR-001 at www.oipc.ab.ca.

A DIVIDED SUPREME COURT OF CANADA CONSIDERS NEW KIND OF SURVEILLANCE



The recent decision of the Supreme Court in R. v. Gomboc has generated lot of discussion and controversy.

Calgary police had suspicions that a grow-op was operated from a residence. They requested that Enmax, an electrical utility, install a digital recording ammeter to obtain information about electricity consumption. On the basis of the pattern of usage evidenced by the ammeter, city police obtained a search warrant that led to seizure of a large quantity of marijuana. At issue before the Supreme Court was whether, in collecting the ammeter information without consent and without a warrant, city police had violated section 8 (right to be secure from unreasonable search) of the *Charter of Rights and Freedoms*. The decision was supported by seven of the 9 judges that sat on the appeal. Chief Justice McLachlin and Justice Fish provided a dissenting opinion. Four of the seven member majority concluded that the disclosure of the ammeter information did not reveal intimate and private information for which individuals rightly expect constitutional privacy protection. They also found that the utility company had a legitimate interest in electricity loads and was entitled to install an ammeter on a customer's line on its own initiative to measure the electricity being consumed. Of the majority, 3 of the judges agreed with the result but for different reasons. The full decision is available through CanLII at 2010 SCC 55.

SPYWARE USED BY PARENTS HELPED MARKETERS TO SPY ON CHILDREN

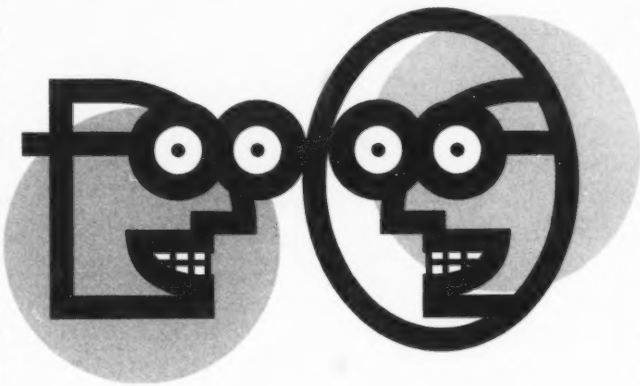
The Bureau of Consumer Protection of the U.S. Federal Trade Commission (FTC) has responded to complaints from the Electronic Privacy Information Centre and the Center for Digital Democracy. The complaint was that information collected by the Sentry software sold by EchoMetrix, a software company, was in turn being sold to marketers and advertisers by means of a different software program, called Pulse. The program enabled parents to secretly check the web surfing history of their children as well as instant messaging activity even though it was password protected. The Pulse program however also enabled marketers to obtain information about the viewing activities of the children. The Bureau found that EchoMetrix did not provide adequate notice to subscribing parents of the surveillance feature enabled by Pulse. You can see the decision of the FTC at http://www.ftc.gov/opa/2010/11/echometrix.shtm.

FEDERAL COURT FINDS PIPEDA BREACH BUT REFUSES TO AWARD DAMAGES

The Federal Court of Canada recently found that a company had breached the *Personal Information Protection and Electronic Documents Act* (PIPEDA). This involved disclosing certain information about an employee to his employer without consent or lawful justification. The Federal Court concluded that the substantial damages the employee claimed were really for the wrongful termination of his employment rather than compensation for the breach of his right to privacy. Hence, no damages were awarded. You can review the decision at Curtis Harold Stevens v. SNF Maritime Metal Inc. 2010 FC 1137.

PRIVACY—PROTECTIVE FACIAL RECOGNITION

Ann Cavoukian, Ontario Information and Privacy Commissioner, has released an interesting research report on the use of biometric encryption to limit "self-excluded" problem gambler access to gaming venues. The objective was to develop a technology that would provide improved privacy protection over simple facial recognition, without compromising functionality or performance. One of the challenges was how to include such features as not storing any information when the system does not find a match and strengthening the protection of all personal information of those citizens enrolled in the voluntary self-exclusion program. You can find the full report at www.ipc.on.ca under the title: *Privacy-Protective Facial Recognition: Biometric Encryption Proof of Concept* (November 2010).



USA PRIVACY DEVELOPMENTS—FEDERAL TRADE COMMISSION PROPOSED PRIVACY FRAMEWORK

This month the U.S. Federal Trade Commission (FTC) has released a proposed framework for businesses and policymakers. Entitled *Protecting Consumer Privacy in an Era of Rapid Change* it proposes a framework constructed upon the 'notice and choice model', the 'harm based model', the FTC's law enforcement experience and the input from a series of recent roundtables. It would apply to online and offline commercial entities. The main components are: (1) 'Privacy by Design' approach, (2) simpler, more accessible choices for consumers and (3) enhanced transparency about company's practices. This report is available at: http://www.ftc.gov/.

MEDIATION PART OF THE LITIGATION PROCESS

The Ontario Court of Appeal has determined that mediation is part of the litigation process. In the result, the applicant under that province's access law was denied access to certain mediation documents on the basis that they were part of the exemption for litigation records. The decision is

Ontario (Liquor Control Board) v. Magnotta Winery Corp., [2010] O.J. No. 4453, Ont. C.A. Although the Saskatchewan OIPC has not had occasion to consider this issue, we note that the solicitor-client privilege exemption in section 22 of FOIP appears at least as broad as its Ontario counterpart.

BC COMMISSIONER'S OFFICE ORDERS RELEASE OF CONTRACTS WITH PUBLIC BODIES

Adjudicators in the British Columbia OIPC have ordered the full release of contracts between public bodies and suppliers in two November Orders. In one case, the Vancouver Island Health Authority was ordered to provide access to contracts and documentation with respect to dietary and housekeeping services provided by a contractor. The Authority failed to substantiate that disclosure would cause economic harm (Order F10-40). In the other, the Ministry of Citizen's Services was ordered to release the contract documentation between the province and IBM. The Adjudicator found that the Ministry's submission that, if the disputed information is released vendors will not negotiate future contracts, was unconvincing (Order F10-39). Both Orders can be accessed at oipc.bc.ca.

MARK YOUR CALENDAR!

January 20—21, 2011: Western Forum on Privacy Law & Compliannce—*Practical Solutions for Conquering your Critical Privacy Challenges & Reducing Liability Risks*, Fairmont Palliser Hotel, Calgary, AB. For more information visit www.canadianinstitute.com/privacywest.htm.

February 16 – 18, 2011: 12th Annual Privacy and Security Conference - *Security and Privacy – Is there an app for that?,* Victoria Conference Centre, Victoria, BC. For more information visit Reboot Communications Limited

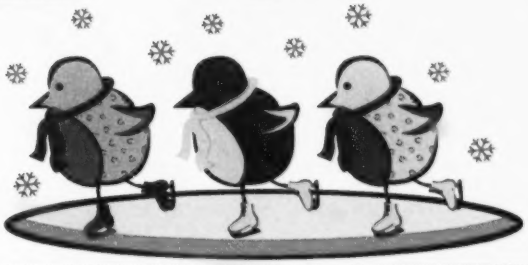
March 9 – 11, 2011: International Association of Privacy Professionals (IAPP) Global Privacy Summit, Washington, DC. For more information visit: IAPP : Global Privacy Summit

March 10 – 11, 2011: 2011 Information Management, Access and Privacy Symposium, Metro Toronto Convention Centre, Toronto, ON. For more information visit: IMAPS 2011.

Year's end is neither an end nor a beginning but a going on, with all the wisdom that experience can instill in us.

- Hal Borland

Happy New Year 2011



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